1693

SUPREME COURT OF THE UNITED STATES.

No. 171.

ANN C. SMITH, USE OF CALEB CUSHING, PL'FF IN ER.,

VS.

THE CORPORATION OF WASHINGTON.

IN ERROR TO THE CIRCUIT COURT U. S. FOR THE DISTRICT OF COLUMBIA, HOLDEN IN AND FOR THE COUNTY OF WASHINGTON.

INDEX.

	Original.	Print.
Writ of error	1	1
Citation	2	1
Copy of appeal bond	3	2
Style of court	5	2
Parties	5	3
Nar	8	4
Plea of not guilty, and issue joined	14	6
Jury	16	7
Verdict and judgment for defendants	16	7
Memorandum	17	7
Plaintiff's bill of exceptions	17	8
An act making appropriations for certain improvements in 2d ward, marked No. 1, referred to in plaintiff's exceptions, p. 18	21	9
An act making certain improvements, and repealing the above, marked No. 2, referred to in plaintiff's exceptions, p. 18	22	9
An act to set curb-stone and lay pavement on south front of squares 284 and 248, marked No. 3, referred to in plaintiff's exceptions, page 18	24	10
An act authorizing curb-stone to be set and foot-way paved on south side of K street, marked No. 4, ref'd to pl'ffs ex., p. 18	25	10
An act for grading K street, marked No. 5, referred to as above	26	11
An act for taking up the pavement north side of K street, marked No. 6, referred to as above	26	11
An act to provide for grading K street between 12th and 14th street, marked No. 7, referred to as above	27	11

	Original.	Print.
An act for reducing the grade north side K street between 13th and 14th streets, marked No. 8, referred to as above	29	12
Letter from the mayor to Charles L. Coltman, marked No. 9, referred to as above	30	9
Plat	bet. 30 & 31	13
An act making an appropriation for completing the graduation of the city, marked No. 11, ref'd to as above	31	13
Letter from the surveyor to the board of common council, marked No. 12, ref'd to as above	33	13
Testimony of William Digges	34	14
" " Joseph Bryan	38	16
" " Randolph Coyle	39	16
" " Cha's L. Coltman	43	18
" " Cha's B. Cluskey	46	19
Writ of error produced	59	24
Clerk's certificate	60	24

UNITED STATES OF AMERICA.

The President of the United States of America, to the judges of the circuit court of the District of Columbia, sitting for the county of Washington, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court, before you, or some of you, wherein Ann C. Smithis plaintiff, and the mayor, board of aldermen, and board of common council, of the city of Washington, are defendants, a manifest error hath happened to the great damage of the said plaintiff, as by her complaint appears; we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that, under your hand, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the first Monday of December next, in said Supreme Court, to be then and there held; and that the record and proceedings aforesaid, being inspected, the said Supreme Court may cause further to be done therein to correct that error which of right, and according to the laws and custom of the United States, should be done.

Witness the Hon. Roger B. Taney, Chief Justice of said Supreme Court.

Issued this 9th day of June, 1856.

JNO. A. SMITH,
Clk.

DISTRICT OF COLUMBIA, *to wit:*

The United States of America to the mayor board of aldermen, and board of common council, of the city of Washington, greeting:

You are hereby cited and admonished to be and apppear at a Supreme Court of the United States, to be holden at Washington, on the first Monday of December next, pursuant to writ of error filed in the clerk's office of the circuit court of the District of Columbia, for the county of Washington, wherein Ann C. Smith is plaintiff in error, and you are defendants in error, to shew cause, if any there be, why the judgment of the said court in the premises should not be corrected, and why speedy justice should not be done to the parties in this behalf.

Witness the Hon. James Dunlop, chief judge of the circuit court of the District of Columbia, this 9th day of June, 1856.

JAS. DUNLOP.

Served on the mayor, and was informed by him that Mr. Carlisle would attend to it.

J. D. HOOVER,
Marshal.

Know all men by these presents, that we, Caleb Cushing and Ransan H. Gillet, are held and firmly bound unto the mayor, board of aldermen, and board of common council, of the city of Washington, in the full and just sum of two hundred dollars, current money; to which payment, well and truly to be made and done, we bind ourselves, and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals, and dated this ninth day of June, 1856.

Whereas, lately, at a circuit court of the District of Columbia, sitting for the county of Washington, at March term, 1856, wherein Ann C. Smith was plaintiff, and the said mayor, board of aldermen, and board of common council, of the city of Washington, were defendants, judgment was rendered against the said plaintiff, and she having obtained a writ of error, and filed a copy thereof in the clerk's office of the said circuit court, to reverse the judgment in the aforesaid suit, and a citation directed to the said mayor, board of aldermen, and board of common council, citing and admonishing them to be and appear at a Supreme Court of the United States, to be holden at Washington, on the first Monday of December next:

Now, the condition of the above obligation is such, that if the said Ann C. Smith shall prosecute her writ with effect, and answer all damages and costs if she fails to make her plea good, then the above obligation to be null and void; otherwise to be and remain in full force and virtue in law.

C. CUSHING [SEAL.]
R. H. GILLET, [SEAL.]

Signed, sealed, and delivered in the presence of—
R. S. SPAFFORD.

Approved by the court.
True copy. Test:

JNO. A. SMITH, *Clerk.*

Style of Court.

DISTRICT OF COLUMBIA, *to wit:*

At a circuit court of the District of Columbia, begun and held

1695-

in and for the county of Washington, at the city of Washington, on the fourth Monday of March, in the year eighteen hundred and fifty-six, and of the independence of the United States the eightieth:

Present, the honorable James Dunlop, chief judge; James S. Morsell, William M. Merrick, asst. judges; Jonah D. Hoover, esq., marshal; John A. Smith, clerk—

In the records of the proceedings of the said court, amongst others, are the following, to wit:

Parties.

ANN C. SMITH, use of CALEB CUSHING,
vs.
THE MAYOR, BOARD OF ALDERMAN, and Board of Common Council of the city of Washington.

Rule nar., and impailance to March term, 1853.

Be it remembered that heretofore, to wit, at the October term, 1852, of the said circuit court, come into court here, as well the said plaintiff, by R. H. Gillet, esq. her attorney, as the said defendants, by Joseph H. Bradley, esq., their attorney; and thereupon, on motion of the said parties, by their attorneys aforesaid, and by leave of the court here, the said cause is docketed by consent; whereupon, on motion of the said defendants, by their attorney aforesaid, it is ruled by the court here that the said plaintiff declare against the said defendants, or judgment by the court here will be rendered against her in default thereof:

Whereupon the said plaintiff, by her attorney aforesaid, prays leave of the court here to impail until the 4th Monday of March next, and then to declare against the said defendents, and to her it is granted; the same day is given to the said defendants also.

Appearance and impailance.

At which mentioned fourth Monday of March, in the year 1853, to which said day the said plaintiff had leave to impail, and then to declare against the said defendants, comes again into *into* the circuit court here, as well the said plaintiff, by her attorney aforesaid, as the said defendants, by their attorney aforesaid, and thereupon the said plaintiff, by her attorney aforesaid, as before, prays leave of the court here further to impail until the 3d Monday of October next, and then to declare against the said defendants, and to her it is granted; the same day is given to the said defendants also.

Octo. term, 1853. *Appearance and impailance to March term* 1854.

At which mentioned 3d Monday of October, 1853, comes again into the circuit court here as well the said plaintiff, by her attorney aforesaid, as the said defendants, by their attorney aforesaid, and the said plaintiff, by her attorney aforesaid, as before, prays leave of the court here, further to impail until the 4th Monday of March next, and then to declare against the said defendants, and to her it is granted; the same day is given to the said defendants also.

Appearance and impailance to October term, 1854.

At which mentioned 4 Monday of March, 1854, comes again into the circuit here, as well the said plaintiff, by her said attorney, as the said defendants, by their attorney aforesaid; and the said plaintiff, by her attorney aforesaid, as before, prays leave of the court here further to impaile until the 3d Monday of October next, and then to declare against the said defendants, and to her it is granted; the same day is given to the said defendants also.

At which mentioned 3d Monday of October, 1854, to which said day the said plaintiff had leave to impaile, and then to declare against the said defendants, comes again into court here, as well the said plaintiff, by her attorney aforesaid, as the said defendants, by their attorney aforesaid. Whereupon the said plaintiff, by her attorney aforesaid, declared against the said defendants in form following, to wit:

Nar. of the term of Octo., 1854.

CIRCUIT COURT FOR THE COUNTY OF WASHINGTON,
District of Columbia, Washington County, ss:

"The mayor, board of aldermen, and board of common council, of the city of Washington," were summoned to answer Ann C. Smith of a plea of trespass on the case. And thereupon the said Ann C. Smith, plaintiff in this suit, by J. B. H. Smith, her attorney, complains of said mayor, board of aldermen, and board of common council, of the city of Washington, defendants, for that, whereas the said plaintiff, before and at the time of committing the grievances hereinafter mentioned, was, and from thence hitherto hath been, and still is, the owner and lawfully possessed of a certain lot of land situate, lying, and being in the city of Washington, in said county, being a part of square numbered two hundred and eighty-four, fronting on K street north, together with the buildings thereon.

And the said plaintiff avers that the said K was opened by the said defendants in front of the said lot a long time since, to wit, on or about the year of our Lord one thousand eight hundred and

thirty-one, and from thence became and was a travelled street, to wit, in front of said square, number two hundred and eighty-four, and continued to be such travelled street from thence hitherto, to and at the time of the committing the said several grievances hereinafter mentioned; and the said plaintiff further avers that, long before the committing the said several grievances, to wit, twenty years before buildings were erected on said lot, and improvements made thereon and in front thereof, thereby rendering the said premises a convenient and desirable residence.

And the said plaintiff further avers that, at and before the time of the committing of the said several grievances hereinafter mentioned, a wall had been erected in front of said lot, to protect the earth and prevent its falling upon the side walk, and shade trees had been planted in front of and near said lot, and were then and there growing and affording shade, shelter, protection, and ornament to the said premises, and a sidewalk had been laid in front of said lot, in conformity with the opening of said street, as aforesaid, all which improvements had been long made, to wit, for the space of twenty years, at the expense of the said plaintiff and her grantors; yet the said defendants, well knowing the premises, but contriving and wrongfully intending to hurt, injure, and prejudice the said plaintiff in this behalf, and to obstruct, hinder, and injure her in the use and enjoyment of the said premises, building, and improvements, and to deprive her of the shade, shelter, protection, and ornament of the said trees, and the advantages of the said buildings and improvements, while the said plaintiff was such owner and possessor and entitled as aforesaid, to wit, on the first day of January, eighteen hundred and fifty, and on divers other days and times between that day and the commencement of this suit, the said defendants unlawfully, wrongfully, and injuriously cut down and destroyed said shade trees, and dug up the said flagging, and pulled down and destroyed said wall, and cut and dug down said K street in front of said premises, several, to wit, seven feet, thereby destroying the said improvements in front of the said premises, and greatly obstructing and injuring the ingress and egress to the said lot and buildings, and injuring the value thereof, and depriving the said plaintiff of the shade, shelter, protection, and ornament of said trees, and the comfort and convenience of the said walk.

By means whereof the said plaintiff hath been greatly obstructed and prejudiced in the use and enjoyment of the premises aforesaid, and hath been and is greatly deprived of the advantages thereof, as aforesaid; and also the said plaintiff, by reason of the premises, has been forced and obliged, in order to occupy said lot and buildings, to lay out and expend a large sum of money, to wit, the sum of two thousand five hundred dollars, and in and about repairing the injuries aforesaid, so as to enable her to use and occupy the said premises.

And also for that whereas the said plaintiff was, heretofore, to wit, on the first day of January, in the year 1850, and still is, the owner of a certain lot of land in the city of Washington aforesaid, with the buildings and improvements thereon, situate in square number two hundred and eighty-four, fronting on K street north in said city, which said lot and buildings were used and occupied for a residence; and the said plaintiff avers that the said defendants, well knowing the premises, but contriving and wrongfully intending to injure and prejudice her in this behalf, on the day and year last aforesaid, and on divers other days between that day and the commencement of this suit, entered upon said K street, in front of her said lot and building, and dug down the said street several feet, to wit, seven feet, and destroyed her sidewalk, the wall in front of her said house, and the steps leading thereto, and the shade trees in front of said lot and buildings, obstructing and injuring the entrance thereto—by means whereof the said plaintiff hath been greatly obstructed, injured, and prejudiced in the use and enjoyment of her said lot and buildings aforesaid, and deprived of the full advantages thereof, and has been put to and necessarily incurred great expenses by and on account of the said wrongful acts and doings of the said defendauts, to the damage of the said plaintiff of two thousand five hundred dollars, and therefore she brings suit, &c.

J. B. H. SMITH,
Attorney for Plaintiff.

Pledges to prosecute John Doe and Richard Roe.

Rule plea. Plea of not guilty, and issue joined.

Thereupon, on motion of the said plaintiff, by her attorney aforesaid, it is ruled by the court here, that the said defendants answer to the declaration aforesaid of the said plaintiff in the plea aforesaid, or judgment by the court here will be rendered against them in default thereof. Whereupon the said defendants, by their attorney aforesaid, defend the force and injury when, &c., and say that they are not guilty in manner and form as the aforesaid plaintiff above against them hath declared, and this they pray may be enquired of by the country; and the said plaintiff, in like manner, and so forth. Therefore let a jury thereon appear before the court here, on the 4th Monday of March next, by whom, &c., and who neither, &c., to recognize, &c., because as well, &c. The same day is given to the said parties, then and there, &c.

Venire facias to March term, 1855.

At which mentioned 4th Monday of March, 1855, comes again into the circuit court here as well the said plaintiff, by her attorney aforesaid, as the said defendants, by their attorney aforesaid: whereupon, further process of and upon the premises aforesaid, between the parties aforesaid, by consent of the said parties, by their

attorneys aforesaid, and by order of the court here thereon, the said cause is continued until the 3d Monday of Octo. next.

At which mentioned 3d Monday of October, 1855, comes again into the circuit court here as well the said plaintiff, by her attorney aforesaid, as the said defendants, by their attorney aforesaid: whereupon, further process of and upon the premises aforesaid, between the parties aforesaid, by consent of the said parties, by their attorneys aforesaid, and by order of the court here thereon, the said cause is further continued until the 4th Monday of March next. The same day is given to the said parties then and there, and so forth.

March term, 1856.

And now, at this day, to wit, the said fourth Monday of March, 1856, comes again into the circuit court here as well the said plaintiff, by her attorney aforesaid, as the said defendants, by their attorney aforesaid: whereupon, for trying the issue aforesaid, it is ordered by the court here that twelve persons from the panel of petit jurors, returned to the court here by the marshal of the District aforesaid, be called, who being called come, to wit: 1. William H. Wallace. 2. Samuel Phillips. 3. William Miles. 4. Anthony Addison. 5. William Cammack. 6. James Cull. 7. James Dixon. 8. Patrick McKenna. 9. Peter Hepburn. 10. Samuel C. Espey. 11. James A. Burns. 12. John Waters—who being duly empannelled and sworn to say the truth of and upon the premises aforesaid, upon their oath do say:

Verdict for defendants, and judgment. Costs.

That the said defendants are not guilty in manner and form as the aforesaid plaintiff above against them hath declared. Therefore, it is considered by the court here that the said plaintiff take nothing by her declaration aforesaid, but that she be in mercy for her false clamor; and the said defendants go thereof without day, &c. And it is also considered by the court here, that the said defendants recover against the said plaintiff the sum of forty dollars and forty-nine cents, for their costs and charges by them about their defence in this behalf expended, unto the said defendants by the court here on their assent adjudged, and that the said defendants have thereof their execution, &c.

Test: JNO. A. SMITH, *Clk.*

Mem.

Memorandum. Before the jurors aforesaid retired from the bar of the court here, the said plaintiff, by her attorney aforesaid, filed in court here the following bills of exceptions, to wit:

Jury called and sworn.

CIRCUIT COURT.

ANN C. SMITH
vs.
THE CORPORATION OF
Washington.

May 30th, 1856. Parties appeared by their counsel.

The cause was opened to the jury, who were called and sworn by the counsel of both parties.

By agreement of the parties, sundry acts of the corporation, admitted and received in evidence, marked 1, 2, 3, 4, 5, 6, 7, 8, and a letter of instruction by the mayor of Washington to Charles L. Coltman, commissioner, &c., and dated the 30th October, 1830, numbered 9.

It was also agreed between the parties to admit in evidence a plat of certain portions of the city of Washington, marked No. 10, which show the grade above tide-water at and by near the premises mentioned in said declaration in this cause. The grade marked as by King, shows that made when the original survey of said city was made; that marked as by Humphrey was made by direction of the corporation, under a resolution of Oct. 7, 1841, marked No. 11, and was the one acted upon in 1851, under the laws prior to that of 12th Sept'r, 1851; that marked as by the corporation, was the grade established by the act of 12 Sept., 1851, and was marked thereon, by R. Coyle, by direction of the city corporation; and that the regrading under the latter act conformed to this corporation grade.

It is admitted by the parties that said Coltman opened and graded K street, in front of the premises of the plaintiff, and gravelled the same in conformity to the instructions of the corporation, under the acts of 1830, 1831, and 1832 aforesaid; and that the same remained without alteration by the corporation until 1851; that said taxes mentioned in said acts were collected and paid, and applied as contemplated in them.

It was further agreed and admitted, that seven two-story brick houses were erected as contemplated in the said act of 1830, in a uniform manner, and that they set back from the street about twenty feet; that there was a wall and an iron fence in front next to the street, and between which and the house at the time of repaving in 1851, the same contained shade trees and shrubs, which were ornamental; and that there were in front, near or in the sidewalk, large and beautiful shade trees that were ornamental and useful, and which had been growing from about the time of the erection of said houses; that said plaintiff owned one of said houses at the time of regrading in 1851; that said shade trees in front,

were then cut down and destroyed, and her said house was left several feet above the grades made in 1851.

It was further agreed and admitted that after the said last regrading said house was not accessible without improvements being made to enable her to do so; that under the said acts of February, March, and August, 1851, said street, in front of plaintiff's house, was regraded according to Humphreys' survey, and gravelled, and the said walk and curb-stones were taken up; and that afterwards, the gravel was removed from said street, and the said street and sidewalk were regraded afterwards, and made to conform to the said grade fixed in and by the act of 12th Sept'r, 1851; and that said sidewalk in front of her house was relaid at the expense of the plaintiff in conformity with the said last-mentioned grade.

It is also admitted that no compensation has been made to the plaintiff for the damages which she has sustained; and that there has been expended in building a stone wall and stone steps in front of her said premises, and in an iron fence, and in grading and sodding in front of her house, and in setting out shade trees in the street in place of the former ones, the sum of $813.

No. 1.—Ch. 50, pp. 19, 20, Laws, 1830.

An act making an appropriation for certain improvements in the second ward.

Be it enacted, &c., That the sum of six hundred dollars, be and the same is hereby, appropriated, payable out of the funds of the second ward, not otherwise appropriated, for the purpose of graduating and gravelling K street north, from Twelfth street and Fifteenth street west; and that the sum of two hundred dollars be, and the same is hereby, appropriated out of the funds of the second ward, not otherwise appropriated, for graduating Twelfth street west from H street north to K street north.

SEC. 2. And be it enacted, That whenever the mayor shall be satisfied that six or seven two-story brick buildings shall have been commenced and built up to the level of the first floor on the south-half square two hundred and eighty-four, then it shall be lawful to proceed forthwith to graduate and improve the said streets as directed by the first section of this act, and not before.

Approved October 23, 1830.

No. 2.—Laws, 1831, p. 12, ch. 17.

An act making certain improvements in the second ward, and repealing the act entitled "An act making an appropriation for certain improvements in the second ward, passed on the twenty-third of October, eighteen hundred and thirty."

Be it enacted, &c., That the sum of six hundred dollars be and the same is hereby appropriated, payable out of the funds of the second ward, not otherwise appropriated, for the following purposes, that is to say, four hundred and fifty dollars for graduating K street north from Thirteenth and Fourteenth streets west, and one hundred and fifty dollars for gravelling K street from Thirteenth street to Twelfth street.

SEC. 2. And be it enacted, That the sum of two hundred dollars be, and the same is hereby, appropriated, payable as aforesaid, out of the funds of the second ward, for gravelling and graduating Twelfth street west from H street north to K street north, in the second ward.

SEC. 3. And be it enacted, That the act entitled, "An act making an appropriation for certain improvements in the second ward," passed the 23rd of October, 1830, be, and the same is hereby, repealed.

Approved August 11th, 1831.

No. 3.—Laws 1832, chap. 67, p. 30.

An act authorizing the curb-stone to be set and the pavement to be laid on the south front of squares numbered 284 and 248, between Twelfth and Fourteenth streets west, on the north side of K street north, in the second ward.

Be it enacted, That a sum not exceeding three dollars per front foot be, and the same is hereby, assessed on the lots fronting on the north side of K street north, between Twelfth and Fourteenth streets west, being the south front of squares numbered two hundred and eighty-four and two hundred and forty-eight, in the second ward, for the purpose of paying the expense of setting the curb-stone and paving the footway in front of the said lots as above described.

Provided, that no more of said tax shall be collected than may be sufficient to effect the same, agreeably to the provision of an act of the fourth of April, one thousand eight hundred and thirty-nine, concerning paved footways. And provided, that the said pavement shall not be made before the graduation shall be obtained.

Approved May 1st, 1832.

No. 4.—Act Feb'y 20, 1851.

An act authorizing the curb-stones to be set and the footway paved on the south side of K street north, between Tenth and Thirteenth streets west.

Be it enacted &c., That the mayor be, and he is hereby, authorized and required to cause the curb-stones to be set and the footway paved on the north fronts of squares numbered two hundred

and eighty-five, three hundred and seventeen, and three hundred and forty-three, being the south side of K street north, between Tenth and Thirteenth streets west, in conformity with the provisions of the act concerning paved footways, approved fourth of April, eighteen hundred and twenty-nine; and for defraying the expenses thereof, a tax is hereby imposed and assessed upon the lots on the north fronts of the said squares numbered two hundred and eighty-five, three hundred and seventeen, and three hundred and forty-three, to the amount of said expenses, provided that no tax shall be laid to exceed three dollars per front foot of said lots.

Approved February 20th, 1851.

No. 5.—Laws, 1851, p. 104, ch. 272.

An act for grading K street north, between Twelfth and Thirteenth streets west.

Be it enacted, &c., That the sum of three hundred dollars, or so much thereof as may be necessary, be, and the same is hereby, appropriated, payable out of the funds of the second ward, for the purpose of grading and gravelling K street north, between Twelfth and Thirteenth streets west, the work to be done under the direction of the commissioner of the first and second wards, and two assistant commissioners to be appointed by the mayor, and to take precedence of other improvements.

Approved March 3, 1851.

No. 6.—Laws, 1851–2, p. 20, chap. 40.

An act for taking up the pavement, grading the side walk, and relaying the pavement on the north side of K street, between Twelfth and Thirteenth streets west, and for other purposes.

Be it enacted by the board of aldermen and board of common council, of the city of Washington, That the mayor be, and he is hereby, authorized to have the pavement taken up on the north side of K street, between Twelfth and Thirteenth streets west, the said walk graded, and the pavement relaid between these points, the whole expense to be paid out of the funds of the second ward; the work to be done under the direction of the commissioners of the first and second wards, and two assistant commissioner to be appointed by the mayor.

Approved August 21, 1851.

No. 7.—Laws, 1851, p. 26, chap. 62.

An act to provide for grading K street north, between Twelfth and Fourteenth streets.

Be it enacted, &c., That the mayor be, and he is hereby, author-

ized and required to cause K street north, between Twelfth and Fourteenth streets west, to be graded in accordance with the provisions, to wit: The points at the southeast corner of the intersection of K and Fourteenth streets, and the southwest corner of the intersection of K and Twelfth streets, to remain as now fixed, and the intersection of K and Thirteenth streets on the south side to be at such elevation as to give not more than fifteen inches fall in every hundred feet, from that point to the southwest corner of the intersection of K and Twelfth streets; the north side of K street to be so graded as not to be more than two feet higher at any point than on the south side; the grade of Thirteenth street shall be made to conform to the points thus ascertained, and the whole to be gravelled; the work to be done under the direction of the commissioner of the first and second wards, and two assistant commissioners to be appointed by the mayor. And to enable the mayor to carry out the provisions of this act, the sum of five hundred dollars, or so much thereof as may be necessary, be, and the same is hereby, appropriated out of the funds of the second ward.

Approved September 12, 1851.

No. 8.—Laws, 1852, p. 134, chap. 390.

An act for reducing the grade of the pavement on the north side of K street north, between Thirteenth and Fourteenth streets west.

Be it enacted, &c., That the mayor be, and he is hereby, authorized to have the pavement taken up on the north side of K street north, between Thirteenth and Fourteenth streets west, the grade reduced to conform to the reduced grade of K street north of that point, the pavement and gutter relaid, and the curb-stone reset; the work to be done under the direction of the commissioner of the ward in connection with the improvement of K street north, and the expenses to be paid out of the funds of the second ward.

Approved June 5th, 1852.

No. 9.

CITY OF WASHINGTON, MAYOR'S OFFICE,
October 30th, 1830.

To MR. CHARLES L. COLTMAN,
Commissioner of the Second Ward.

SIR: Messrs. W. Coventry, H. Waddell, and Anthony Preston, are associated with you to carry into effect an act of the corporation "making appropriation for certain improvements in the second ward," approved the 23d October, 1830. Altho' the actual execution of the work therein contemplated cannot yet be commenced, owing to the restriction of the 2d section, it may nevertheless be

advantageous to take the legal steps for a contract, the execution of which, to be delayed until further directions from this office. You will please immediately notify the assistants of their appointment by this letter.

Your obedient servant,

JOHN P. FAIRNESS,
Mayor.

[For plat, marked No. 10, see original between pages 30 and 31.]

N. B. For all gravelling you will stipulate for keeping it clear of the large stones.

P. S. In contracting it will be proper to state that payment will be made out of the funds of the ward, not otherwise appropriated, as expressed in the law, but I hope no extraordinary credit will be required.

No. 11.

An act making an appropriation for completing the graduation of the city.

Be it enacted by the board of aldermen and board of common council, of the city of Washington, That the sum of five hundred dollars, or so much thereof as may be necessary, be, and the same is hereby, appropriated, payable out of any money to the credit of the general fund not otherwise appropriated, for the purpose of defraying the compensation of persons to be employed under Lieut. Humphreys in completing the survey of the graduation of this city, the cost of the necessary stationery, and other contingent expenses; the same to be expended under the direction of the mayor.

Approved May 26th, 1841.

(No. 12.)

SURVEYOR'S OFFICE,
Washington, April 29, 1850.

To the BOARD OF COMMON COUNCIL:

GENTLEMEN: Having carefully examined K street north, between 12th and 13th streets, I would respectfully report, as requested by your resolution, the best mode to ensure a proper grade for said street. By an examination of the accompanying plot, you will see that I propose to cut, at the northwest curb, corner of K and 12th, four feet one inch, and to raise at the southwest corner seven inches. This grade would fix the highest point on the intersection of K and 13th streets on the north side, where it would cut nearly three feet, and thence westerly, at the distance of one hundred and seventy feet, conform to the present grade. You are aware, from the report of the

mayor, of the circumstances under which the pavement on the north side of K street between 12 and 13 streets were laid out. It is, therefore, not necessary for me to say anything in relation to it. I would, however, remark that, although the grade I propose will increase the ascent to the buildings in front considerably, they will, however, be benefited otherwise, for the grade of the alley on the rear can be made sufficiently even to lower the grade of the yards three feet, and thus drain effectually from the north side of the buildings to the alley.

Respectfully, yours, &c.,

(Signed) C. B. CLUSKEY.

Wm. Digges' testimony.

Cause postponed to and trial resumed on the 23d of May, 1856, when the parties appeared by their respective counsel. William Diggs and Joseph Bryan sworn on the part of the defendants. William Diggs testified that he graded K street in front of plaintiff's house, by direction of the corporation, in 1851, and was commissioner of that ward. The defendants' counsel then offered to prove as follows: And thereupon, the defendant further offered to give evidence to show that before any improvements were made in the said square, numbered 284, several gentlemen, under one of whom plaintiff claims, united in purchasing the whole front of said square on K street, and being desirous to keep up the said ground at the highest practicable elevation, they called on the surveyor to give them a grade by which to build; that the grade on the south side of said K street had been fixed many years before, and they finally agreed among themselves for the grade of the north side of said street, and obtained the approval of Gen'l Jackson, then President of the United States, to the grade so agreed upon, and the surveyor then fixed the points, which points are the same as those indicated in the plat as DeKrafft's; that they proceeded to erect their houses on the south front of said square, placing them at same distance back from the line of the street, and built a brick hall in front, which was placed in the pavement—part of the said street seven feet outside of the building line; this was in the years 1850 and 1851; the defendants then graded the said street, gravelled it, and paved the sidewalk, according to the grade so fixed, and under the said acts hereinbefore given in evidence by plaintiff of 1830 and 1831; that after said street was improved as aforesaid, it was found exceedingly difficult to keep it in repair by reason of the slope from its north to its south side. The water running across it continually broke it into gullies; carried the debries of the street into the gutter on the south side, overflowed the pavement on that side, and discharged itself into the lots on square 285, and by reason of these causes, the said street was unfit for the public use, and dangerous; that under the act of March, 1851, the defendants

caused the said street, on the north side, to be cut down several feet, graded, and gravelled, and afterwards discovered that the flow of water still continued across the street, and the southern side thereof was as bad as before; and they then cut down the street to its present grade, under the act of September, 1851; that they took up the sidewalk to the brick wall of plaintiff's premises, under the act of August, 1851, and relaid it under the said act of September, 1851, but did not, at any time, make any excavation nearer to plaintiff's premises than said brick wall. The plaintiff objects to the admission of this evidence. The court overruled the objection, and admitted the evidence, and plaintiff's counsel hereupon excepted.

Mr. Diggs then proceeded to testify, as follows:

I was appointed commissioner in the early part of 1851, and my attention was called to the condition of K street between 12th and 14th, and I repaired, and did so several times after that, and paid out of the funds of the 2d ward. The street was higher on the north than on the south side, and it could not be kept in repair, because the flow of water would wash the street. It would wash gullies, and we could not keep it in order. The gutter would fill up after each hard rain. The water flowed over the pavement on the south side. This street runs from Georgetown bridge to Bladensburgh road.

Cross-examination.

The houses on north side of K street are known as Franklin Row, and are two-story and basement houses. There were handsome yards in front, filled with shrubbery and flowers, and kept in good order. There was a stone wall between the houses and the curb. There were large poplar trees in front, like those on north side of Franklin Square. On the first cutting down we cut down about two feet on the north side; we then gravelled the street. The first cutting down made the north side of K street lower than 12th street. We finished cutting the street before the new regrading was was commenced, except the pavement. We commenced the second cutting down about a month after we finished the first cutting down. At the second cutting down we conformed to the law. We then cut down the pavement at the same time. There was a family in plaintiff's houses at that time; they could not get out or in without providing steps, unless they went to the rear of the house.

This second cutting down was at the corner of 12th street, some five feet and ten inches, and left Twelfth street that much higher until it was graded. Under the old grade the water that ran down 13th street from L to K ran across the street toward I street. It was our object to carry the water that came from L to K street down K street, one part towards 14th and the other towards 12th street, on the north side of K street, in front of plaintiff's said

house. None of the water in 13th street is allowed under the new grade to cross K street, but is carried east and west. The water that is carried in front of plaintiff's house goes down 12th street on west side. The first I knew of water injuring K street was when I came in as commissioner. We repaired the street by filling in clay and covering with gravel. It has been necessary to build stone walls in front of the house. It has been necessary to remove some of the earth in front, and, in making the repairs, the shrubbery has been removed; that in cutting down we did not remove plaintiff's wall. After we first cut down, we found that the water continued to flow across K street.

Joseph Bryan's testimony.

Joseph Bryan testified that a company of gentlemen, in 1830, arranged to build Franklin Row. De Kraft, the city surveyor, was up there, and he was willing to put up the grade as high as they wanted it. A point was agreed upon by them, and fixed upon it, and the President of the United States, General Jackson, and he approved of the same. It was then graded and gravelled. The front wall in front of the house was seven feet on the street. This grade continued from 1831 to 1851. Street was at times almost impassable for the washing from the streets. When there was a heavy rain, would fill up the gutters and run over the pavements on the south side. I was in the city council in 1251, when the law *were* passed.

Cross-examination.

Can't tell when he first descovered that the water run across K street and injured it, but it might have been in 1834 or 1835. I never saw the water run over the south pavement. I don't think I was in sight of it in a heavy rain.

R. Coyle's testimony.

Randolph Coyle, (called) by deft. and sworn, and testified that he was appointed city surveyor in 1846, and continued to same time in 1850.

When I was surveyor K street was generally in a bad condition. I have nothing to do with plans or execution of them on K street. I put down a footway in 1847 on 12th street. H street then had a footway on the north side and none on the south side, between 12th and 13th streets; can't say whether there was a curb-stone or not at that time. I proposed the diagram now produced and marked No. 11. I am employed by the United States to make plans for grading and regrading the streets in this city; so employed by them or by the corporation, and have been since 1851, and is a civil engineer.

The defendants counsel then asked witness, from his said employment and his knowledge and skill in his said business, he could say whether the said grade of said K street, prior to 1851, was a fit and proper grade for the public convenience and safety, and for the drainage of said city, and if so, what was offensive on these points?

To this the plaintiff's counsel objects, on the ground that it is illegal and improper, and calls for a mere matter of opinion and not for facts. The objection was overruled and the evidence admitted, and plaintiff's counsel excepted. Witness says that the grade was very improper as a permanent grade of the street. The reason why is, it would involve constant repair and expense, and being injurious to the owners of property on the south side, it was liable wash out even if paved with stone, and unsafe to travel.

Cross-examination.

My employment is now under the general government, to make plans for grading of streets under appropriations. I got my appointment from the President, and have been employed since 1850 or 1851. I did not have any connection with planning the grade provided by the acts of 1851—my duties at that time were confined to cases where there had been no grading, and for that reason I was not employed.

The plaintiff's counsel offered to prove that the corporation has allowed other grades to be fixed and made steeper than this on K street. The defts' counsel object, and the court sustains the objection, and the plaintiff's counsel excepts.

Witness don't remember to have seen K street at this place between the first and second grading in 1851. I do not know the condition of K street when first graded in 1830 and 1831.

William Diggs recalled by defendants, and says that under the change made under the act of the fore part of 1851, the water could not run to the north side of K street, and we wanted it to run that way. We tried to get a gutter on the north side of K street at first grading, but could not; but we got one on the second grading.

Daniel Ratcliff, called and sworn on part of plaintiff. I reside in Franklin Row, and have from 1847 or 1848. I know the condition of K street from that time to 1851, but don't recollect that there was any danger in passing that street until after the first cutting down in 1851. The cutting down of K street rendered 12th street steeper north of K street. I resided in Franklin Row when the street was cut down. It subjected me to considerable inconvenience. I sustained many more injuries than plaintiff. I had to cut down to the bottom of my front wall, and take out front wall. The def'ts made a first grade and gravelled, and then graded it. We resisted this second grade. There was no danger in travelling

there after the first grading. Our trees and shrubbery were destroyed. If a proper gutter on the north side of K street had been made, there would have been no difficulty with the water. At the time of the second grading there were no gullies made by the rain. There were high steps in front of our houses, and these had to be taken away, and the entrance made in the basement. Trees and shrubs will not grow there since. Grass dries up there and don't grow well. This cutting down makes a change in entrance and internal arrangements of the houses necessary. These things are injurious to the houses. The corporation has paid me $425 towards my expenses. After the def'ts had cut down the street we were left in the mud for a year or so.

Cross-examination.

Persons passed and repassed. I saw no danger and heard of none. I was there only at meals and at night.

C. L. Coltman's testimony.

Plaintiffs called Charles L. Coltman, who being sworn testified as follows:

I was commissioner of the second ward in 1830, and for two or 3 years after, and opened and graded K street at the place in question, by direction of the corporation, and gravelled it as far as the money held out. But it did not extend across the south side curb set on 12th, from I to K, but none on K street on the south side. Part of the 13th street water run west. Footway on south side of K street was laid several years before the regrading in 1851. May have been gullied on south side, but not as to prevent carts and wagons getting along on the north side by washing out loose dirt. If the street had been properly taken care of, there would have been no gullies there which would be difficult to pass. Sometimes gravel was off. If there had been a large well-paved gutter the gravel would not have washed off. The grade when I left it was not such as to make it difficult or dangerous to pass along the street. I have never found any difficulty in passing with teams. There might have been a gutter made on the north side of K even before the first grade in 1851; and one might after that have been made so as to carry off the water. If where I graded it there had been a large paved gutter on the south side and a footway laid, the water would, on ordinary occasions, been carried off to Twelfth street.

If the gutters had been made across K street on 13th, the water from back toward L street would have been carried toward I street, and would not have flooded in front of K street. When I made the grade, it was intended to have the 13th street water run down 13th street, but this was not completed as the money run short, and we cut off improvements. I saw K street between the

first and second grading in 1851. I saw no necessity of the second regrading.

The witness is asked if he has been employed by the def'ts on opening and grading streets in the city of Washington?

The witness says that he was commissioner for six years, and opened and graded numerous streets, or caused them to be done, from the plans laid down in the city book with sundry alterations, the points of level being given on the ground by the surveyor of the city; that this does not require any special skill, but any person can do it. Witness is asked whether was any apparent necessity for making the second grade in 1851. This question was objected to by the deft's' counsel, and objection was overruled; defendants' counsel excepted?

Answer. I saw no necessity in reality for making the second regrade in 1851.

Cross-examination.

The reason why there was no necessity for the second regrade in 1851 was, that it was not too steep. There was no necessity for rounding the center of the street. A four-feet gutter would have carried off the water. The water could have been taken to I street. I don't think it would be out of the way to have a rise of six feet in 107 feet. I drop the outside of the gutter 4 inches below the top of the curb. I think a grade that rises only three degrees in elevation from one side to the other is not an inconvenient grade. I know of no grade on north side of K, until one was given by DeKraft.

C. B. Cluskey's testimony.

Charles B. Cluskey called by plff't, and sworn, testified: Have resided here about nine years. Was city surveyor from 1848 to 1851. As such, I examined K street between 12th and 13th streets, and reported to the city council. I saw K street between the first and second grading in 1851. 12th street had been previously graded, and pavement laid on east side of 12th, north of K, extending north on L or M. I looked to the improvements of K street with reference to this point on 12th. Humphreys had fixed the grade on 12th street as recorded of 76° 50′, as shown by the plat No. 11, being about 3½ feet below, when it was fixed in front of Franklin Row, originally. I thought Humphreys' grade a good one, and could not be improved unless the south side of K street was raised. My report was in 1850, which is hereto annexed, marked No. 12; report is read. The first grade in 1851 conformed very nearly to it. I could not recommend a *a* grade deeper than I recommended to the council, taking into consideration the grades established north of it.

Cross-examination.

The second grade of 1851 cut down 12th street 3 feet 10 more than Humphreys' grade, and more than I recommended. The water runs across street between first and second grade at four feet in the hundred; is about ½ inch to the foot; this is the usual grade of sidewalks.

The defendants' counsel asked the court to give the following instructions, which was given by the court, and plaintiff's counsel excepted,

If, from the whole evidence aforesaid, the jury shall find that the defendants, bona fide, and to promote the public convenience, and to complete and extend the grading of the streets of said city, caused the north side of K street to be cut down, graded, and completed, and thereby caused the damage in said declaration complained of; and that, in the execution of said work, the said corporation made their said excavation in the street, and at a distance of six or seven feet from the front line of the plaintiff's said premises, then the damages so as aforesaid alleged by the plaintiff, if the jury shall believe the same was occasioned by the acts aforesaid of the defendants, and not otherwise, is damnum absque injuria, and the plaintiff is not entitled to recover in this acton, which instruction the court gave as prayed; whereupon, the plaintiff, by her counsel, excepts to said ruling of the court, and prays the court to sign and seal this his bill of exceptions, and to cause the same to be enrolled, which is done, this 22d day of May, 1856.

And on the trial of said cause, and before the same was submitted to the jury, the counsel for the said plaintiff requested the said court to give the jury the following instructions, to wit:

1. That if they find from evidence, that the grade of K street north in front of said plaintiff's premises mentioned in said declaration, was established and made, and said street gravelled, at or about the year 1832, and the said sidewalk graded and flagged at or about the same time, by the direction and authority of said corporation at the time of opening said street, and in pursuance of the acts of October 23, 1830, August 11, 1831, and 18th of May, 1832—that then the said corporation had no power or authority to regrade said street in a manner to occasion expense to the plaintiff, or injure the use or value of her property, without making compensation therefor, and that the defendants are liable for the damages which the said regrading occasioned plaintiff.

Refused.

2. That if they believe that the plaintiff or her grantors was induced to build said house in consequence of the said act of October 23rd, 1830, and the grading of said street in front thereof under it, that then in that case the changing of said grade to her injury, without making compensation, was an act of bad faith towards her, for which the defendants are liable.

Refused.

That if they find that the said street in front of plaintiff's house, was graded under and in pursuance of the act of March 3, 1851, by said defendants, that then the regrading under the act of September 12, 1851, was unauthorized, if the plaintiff sustained injury thereby, for which no compensation was made; and that then, and in that case, the defendants are liable to her for the injury which she sustained thereby.

(Refused.)

That if they find that the said defendants caused the pavement in front of said plaintiff's house to be taken up, and said side-walk to be regraded and the pavement relaid, that then the taking up the same, and regrading and relaying the same, under the acts of August 21, 1851, and 12th of September, 1851, without making compensation for the damages the said plaintiff might sustain thereby, was unauthorized and unlawful, and that said defendants are liable to the plaintiff for the damages sustained thereby.

(Refused.)

That under the act of Congress authorizing said defendants to open streets, when they have once graded and opened the same, that they have no lawful authority without the consent of the property holders injured thereby, and without making compensation for the damages sustained, to regrade so as to injure the value or the use of real estate when the said regrading is made; and that if they find said defendants have so regraded, they are liable to said plaintiff for all damages she has sustained by such regrading.

(Refused.)

That if the jury find that the said street had been previously graded by the said corporation, that no changes by the action of the elements thereon, or by natural causes resulting from said grade, can authorize such regrading; and that if the said defendants regraded said streets on account of such changes, they are liable to said plaintiff for all damages which she sustained thereby.

(Refused.)

That if the jury find that said street was graded and gravelled, in August, 1851, by said corporation, that without a change of circumstances, and the occurrence of a new and further necessity for a change in said grade, that then the regrade under the act of 12th of Sept., 1851, was unauthorized and unlawful, and the defendants are liable for such damages as the plaintiff may have sustained by said last-mentioned regrading.

(Refused.)

That if the jury find that the defects in the street were such as were occasioned solely by a neglect in not preserving it in the condition in which it was left when first graded under the laws of 1830, 1831, and 1832, that then the defendants were not authorized to regrade said street under either of said acts of 1851, and that

their doing so was illegal, and renders them liable for all damage growing out of such regrading resulting therefrom.

(Refused by a divided court.)

That if the jury find that said street could have been restored to its condition, as established under the grading originally made, without cutting down said street and regrading it, that said defendants were bound so to restore it without regrading, and that such regrading was unauthorized and illegal, and renders the defendants liable for all damages sustained by the plaintiff resulting therefrom.

(Refused.)

That if the jury believe that said defendants, in regrading said street in 1851, cut down said street lower than was necessary to restore the former grade, and render the said street equally passable, that such excess of cutting down was unauthorized and illegal, and the said defendants are liable to said plaintiff for all injury sustained by such excess of cutting down.

(Refused.)

That if the jury find that in said regrading in 1851, the defendants cut down said K street in front of said defendants' premises so much as to render it necessary to regrade and cut down Twelfth street, and thereby render that portion of it north of said K street steeper and more difficult of passage that it formerly was; that such fact raises a *presentation* that said regrading to the extent it took place was unnecessary and improper, and unless such presumption is repeated by proof, that the said regrading was unauthorized, and renders the defendants liable to the plaintiff to the extent of the damages which she has sustained thereby.

(Refused.)

That if the jury find that the fall between the north and south sides of K street in front of plaintiff's premises, by the first grading or first regrading, was not greater than that in one or more of the grades in the city of Washington made or suffered by the defendants in opening and grading said streets, that such fact will raise the presumption that said regrading was not a work of necessity, and was therefore illegal and unauthorized, and renders them liable to all such damages as the plaintiff sustained by such regrading.

Refused.

That if the jury find that the north side of said K street in front of plaintiff's house was cut down so low as to turn the water from 13th street from its natural course from north to south, from the high grounds at the north of said K street to the low grounds on I street, at the south, and make it run east to Twelfth street, that such fact is presumptive evidence that said street was cut down more on said north side than was necessary or proper, and that unless disproved, it is conclusive against the defendants that they cut down there more than was necessary, and that they are liable to the plaintiff for all damage she has sustained thereby.

(Refused.)

That if the jury believe that said K street, or any part thereof, where it crosses 12th street, was left higher than said K street, and impassable for teams, or materially obstructed from the regrading in 1851 to the fall of 1854, or to other time, that such fact is presumptive evidence that said regrading was not necessary for the purposes, passing, and travel on said K street, but that it was lowered below said 12th street at that point for some other purpose; and that unless disproved, it renders said defendants liable to said plaintiff for all damage she may have sustained by so regrading.

(Refused.)

That if the jury find that the lowering the north side of K street in front of said plaintiff's house, and the making a gutter there from 12th to 13th street, would have obviated the objection of the flow of the water across the street and gullying the same, without regrading to the extent which said street was regraded, that then said defendants are liable to said plaintiff for all damages sustained by lowering the north side of said street more than was necessary to protect against said flow and injury.

(Refused.)

That the statute of Congress authorizing said corporation to open and grade streets in said city is not a continuing power, but when once opened and graded that such corporation is not authorized to regrade the same in a manner whereby private property is injured; and that if they do so, they are liable to those injured for all damages sustained thereby.

(Refused.)

The court having refused to give said instructions, the plaintiff's counsel excepted.

The defendants' counsel thereupon asked the said court to give the following instructions:

And thereupon the said plaintiff's counsel, insisting before the jury that the said change of grade was not made by defendants bona fide, the defendants now pray the court further to instruct the jury that the defendants cannot be made responsible in damages in this action, unless from the evidence the jury shall find that the said change was made wantonly, wilfully, and maliciously; which instruction the court gave as prayed.

Whereupon the plaintiff, by her counsel, excepted, and prays the court to sign and seal this her bill of exceptions, this 23d day of May, 1856.

And the said court thereupon gave said instructions, and the counsel for the plaintiff excepted.

And thereupon the said jury, under the said ruling of the court, found a verdict for the defendants.

And the counsel for the said plaintiff, having duly and in proper time excepted to the decisions and rulings of the said court, as